

MAY 5 1999

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

Geraldine Trautelaar Crockett,  
Clerk  
/ccc

IN RE:

LOUIS WILLIAM SCHAFER, JR. and  
MARY LYNN HUNTER SCHAFER,

Debtors.

Bankruptcy No. 97-33183  
(Chapter 7)

JAMES E. STARNES,

Plaintiff,

Adv. No. 98-3117

vs.

JUDGEMENT ENTERED ON MAY 5 1999

LOUIS WILLIAM SCHAFER, JR. and  
MARY LYNN HUNTER SCHAFER,

Defendants.

ORDER

This matter is before the Court upon Defendants' Motion for Stay Pending Appeal filed March 19, 1999. A hearing was conducted on April 22, 1999. The motion seeks a stay of the adversary case pending the appeal of a ruling this Court made January 26, 1999, which extended the time for the Plaintiff ("Starnes") to perfect service of the complaint on the Defendants ("the Schafers"). Defendants assert that this Court's ruling will most likely be overturned, based on Fourth Circuit Court of Appeals case law regarding Federal Rule of Civil Procedure 4(m).

For the reasons stated below this Court now reconsiders its earlier ruling and finds that it was in error to extend the time for service. That ruling is now rescinded, and the adversary case

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is to be dismissed without prejudice. The Defendants' appeal has not been docketed, and therefore it is moot, as is the current motion for stay pending the appeal.

#### Findings of Fact

The Schafers filed a Chapter 7 bankruptcy petition on December 30, 1997. Prior to bankruptcy, the Schafers operated a construction firm known as Schafer Builders, Inc, which is also in bankruptcy in this court, case number 97-32481. This adversary proceeding arises out of a contract between Schafer Builders and Starnes for the construction of a residence. Starnes contends that Schafer Builders' construction was defective and that both Schafer Builders and the Schafers individually are liable to him under a variety of legal theories.

In the Schafers' individual bankruptcy case the period for objecting to dischargeability under 11 U.S.C. § 523 was extended twice, due to some problems scheduling a rule 2004 examination of the Debtors. The time was extended for two sixty (60) day periods, or until approximately August 15, 1998.

On August 13, 1998, the Clerk of the Court received for filing an adversary complaint by Starnes, but without the filing fee or the cover sheet. On August 14 the filing fee was tendered. On August 20 the cover sheet was received and a summons was requested.

Starnes served an unfiled copy of the complaint to the Schafers' attorney on August 13, 1998. Starnes failed to serve the Schafers with either the complaint or a summons. In fact, the summons for the complaint was not issued until August 20, 1998, yet

it bore a certificate of service that was prepared by Starnes indicating service had been accomplished on August 13, 1998. It is clear that the original summons did not accompany the complaint.

The Schafers filed an objection to the filing of the adversary complaint on September 11, 1998, based on a mistaken impression that the filing fee had not been tendered as of that date. Once the Schafers realized their error, they withdrew the motion. The motion was served on Starnes and indicated that there had been no adequate service on the defendants, in fact the motion was filed under special appearance by the Schafers' attorney.

Starnes filed a motion for default judgment on October 6, 1998 claiming that the Schafers had been properly served on August 12, 1998, one day before the adversary was actually filed and eight days before the summons was issued. The motion for default prompted the Schafers to file an objection, still under special appearance, based on the fact that they had not yet been properly served under the Bankruptcy Rules of Procedure. This was the second time that Starnes was given actual notice that his service was insufficient.

Starnes then attempted to execute service of the summons using the August 20 summons, which had expired because it had not been used within ten days of issuance. The Schafers claim they never received this service of the summons and complaint.

Starnes withdrew his motion for default judgment on December 2, 1998, and at the same time submitted a second motion for default judgment. The second motion was based on the failure of the Schafers to answer the complaint within 30 days of service. The

certificate of service of the expired summons was filed with this court on November 9, 1998, but it states that service was accomplished on September 18, 1998 by first class mail.

A hearing was held on the second motion for default judgment on January 14, 1999. The Schafers were present at the hearing and also had affidavits ready to place into evidence the fact that they had never received a copy of the complaint or of the summons. Starnes initially argued to the court that the summons issued August 20, 1998 had not expired when he attempted to serve it in September/November. However, after the Schafers' counsel and the Court instructed Starnes where in the Federal Rules of Civil Procedure to find the ten day rule, Starnes stipulated to the Court that proper service had not been accomplished as of the January 14 hearing date. Starnes stated: "I think the affidavits are irrelevant because we have already stipulated the summons had expired and, no matter how service was effectuated, it would be insufficient."<sup>1</sup>

The effect of dismissal without prejudice seemed too drastic to the Court at the time of the hearing, instead it granted Starnes an additional 20 days to perfect the service. The Schafers appealed that decision, and at the hearing on their Motion for Stay Pending Appeal they presented case law that made this Court realize that its previous decision was contrary to Fourth Circuit precedent.

#### Conclusions of Law

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<sup>1</sup> From a transcript of the hearing held January 14, 1999, document #25 in the adversary file at 14.

Rule 7004 of the Federal Rules of Bankruptcy Procedure governs the service of an adversary complaint. Rule 7004 requires service of both a copy of the complaint and the valid summons to an individual. This was not done prior to the January 14 hearing. Rule 7004 also states which provisions of Federal Rule of Civil Procedure 4 apply, these include 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m).

Until December 1, 1993, the time period for service of the complaint and summons was governed by Fed.R.Civ.P. 4(j), which stated:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

As of December 1, 1993, Rule 4(j) was redesignated as Rule 4(m) and amended to read as follows:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

The amended language of Rule 4(m) seems to give the Court discretion to direct new service of a summons. Given the prejudice to the plaintiff's action that would result from a dismissal, the Court elected to do so, while requiring Starnes to pay opposing counsel's fees.

However, the Fourth Circuit Court of Appeals has already interpreted Rule 4(m) to require a showing of good cause before any relief may be given. This Court is obliged to follow that interpretation. T & S Rentals v. United States, 164 F.R.D. 422, 424 (N.D. W.V. 1996); See also United States v. Britt, 170 F.R.D. 8, 9 (D. Md. 1996); Johnson v. United Steel Workers of America, 172 F.R.D. 185, 188 n.6 (W.D. Va. 1997). The Fourth Circuit has stated that:

Rule 4(j) was edited without a change in substance and renumbered as Rule 4(m), effective December 1, 1993. Rule 4(m) requires that if the complaint is not served within 120 days after it is filed, the complaint must be dismissed absent a showing of good cause. . . . [I] Rule 4(m) . . . allows the court discretion to extend the time for service. . . . Whether the court acts before or after the deadline for service has passed, however, the court may only grant the extension for good cause. Mendez v. Elliot, 45 F.3d 75, 78-79 (4<sup>th</sup> Cir. 1995).

#### Discussion

Because Fourth Circuit precedent dictates, it must be determined if Starnes demonstrated good cause at the hearing on January 14, 1999. Good cause generally exists when the plaintiff, although not in technical compliance with the 120 day rule, has attempted to effect service with reasonable and diligent effort. T & S Rentals, 164 F.R.D. at 425.

Starnes does not meet this test. Starnes' attempts to serve the Schafers with this adversary complaint have failed miserably from what would appear to be a total lack of attention to the Federal Rules of Civil Procedure and Bankruptcy Procedure. As of the January hearing, well after the 120 days had expired, the Schafers still had not been served, as stipulated to by Starnes.

Beginning in September 1998 Starnes had notice that his service was insufficient. His attempts to rehabilitate the service were botched by his service of an expired summons. He stood before the Court and stated that he did not believe that the summons had expired, and it wasn't until this Court and the Schafers' counsel read him the applicable section of the Federal Rules of Civil Procedure that he abandoned that argument.

Additionally, the diligence of Starnes' attempts to re-serve are questionable. He claims to have served the summons in September, but did not get around to filing the certificate of service until November. That, together with the several allegation he made that he originally served the summons days before it was even issued, makes this Court doubt Starnes' veracity.

While Starnes is appearing pro se in this matter, he has in prior hearings advised that he is a licensed attorney in Georgia who maintains a civil, commercial litigation practice. As an attorney, Starnes should be familiar with the Federal Rules of Civil Procedure and capable of learning the Bankruptcy Rules to the extent that they apply.

Another reason this Court was willing to extend more time to Starnes was that the effect of dismissal without prejudice seemed too drastic, since the time to file objections to dischargeability had expired. This would essentially result in a dismissal with prejudice, because Starnes would be unable to re-file his lawsuit. However, the Fourth Circuit has indicated that the mere fact that a suit would be time-barred if re-filed does not constitute good

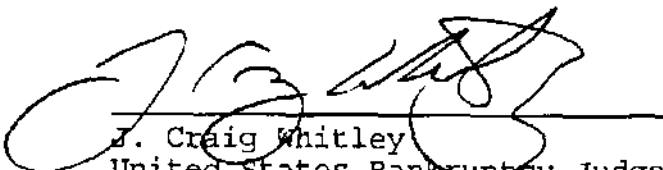
cause. Mendez, 45 F.3d at 78. The Court stated:

Under Rule 4(j), if a plaintiff is not diligent and fails to serve the complaint within 120 days or such further time period as ordered by the court for good cause, the case shall be dismissed without prejudice. The "without prejudice" condition permits a plaintiff to refile the complaint as if it had never been filed. Rule 4(j) does not, however, give the appellant a right to refile without the consequences of time defenses, such as the statute of limitation. Id.

Based on Fourth Circuit precedent, therefore, the fact that the time period for filing dischargeability actions has passed is not a concern that this Court should weigh in its decision to dismiss.

Under Fourth Circuit precedent, Starnes failure to properly serve the Schafers in this adversary action within the 120 days prescribed in Fed.R.Civ.P. 4(m), along with his inability to show good cause for his failure to serve process, must result in dismissal of this action without prejudice.

**WHEREFORE, IT IS ORDERED** that this adversary proceeding, case number 98-3117, is hereby **DISMISSED WITHOUT PREJUDICE**. The Defendants appeal has not been docketed and is hereby **MOOT**. The Defendants' Motion for Stay Pending Appeal is also hereby **MOOT**.

  
J. Craig Whitley  
United States Bankruptcy Judge